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No. 1178

In the

Supreme Court of the United States

OCTOBER TERM, 1966.

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, Deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Reply Brief

(Because the opinion of the court below giving rise to this Petition does not state the basis of the second appeal, the Briefs filed in the court below on the second appeal accompany this Petition as Exhibits.)

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HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered January 25, 1967, affirming a judgment of the United States District Court for the Northern District of Illinois granting an employer's personal representatives exoneration from two Jones Act claims.

Citations to Opinions Below.

The opinion of the court below on what is referred to herein as the first appeal is reported in 350 F. 2d 592, and also appears as an Appendix to Appellees' Brief in the Court of Appeals which accompanies this petition.

The opinion of the court below on what is referred to herein as the second appeal which gives rise to this petition is printed in Appendix "D" hereto, *infra*, p. 17a, and is yet unreported.

Proceedings in this Court.

On petitions for certiorari from the judgment on the first appeal this Court denied certiorari. 382 U.S. 98. The order noted:

> "Mr. Justice Black is of the opinion that certiorari should be granted, the Court of Appeals judgment reversed and the District Court judgment affirmed." [Petitioners sought a review of the limitation allowance and not mere affirmance of the District Court judgment.]

Thereafter, this Court granted the motion of the American Trial Lawyers' Association to file an *amicus curiae* brief but denied a petition for rehearing. 383 U.S. 923. Subsequently this Court denied a motion for leave to file a second petition for rehearing. 384 U.S. 914.

Jurisdiction.

The judgment of the Court of Appeals on the second appeal affirming the District Court judgment which granted the petition for exoneration and dismissed the Jones Act claims was entered on January 25, 1967. Appendix "E", *infra*, p. 20a. The jurisdiction of this Court is invoked under 28 U.S.C., §1254 (1). Cases which

are believed to sustain the jurisdiction of this Court on a petition for certiorari when the Court has previously denied petitions for certiorari from a decision on an earlier appeal are: *Messenger* v. *Anderson,* 225 U.S. 436, 444; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U.S. 251, 257-258; *Mercer* v. *Theriot,* 377 U.S. 152, 153-154; and (cf.) *Gondeck* v. *Pan American World Airways, Inc.,* 382 U.S. 25.

Questions Presented.

1. Was it necessary in order to sustain a judgment against a Jones Act employer for the District Judge to have used the words "negligence" and "proximate cause" in his findings of fact when petitioners' claims were based solely on the Jones Act and findings of proximately causative negligence were implicit in the District Judge's findings, conclusions and judgment?

2. When on remand the District Judge explained at great length that he had found that the Jones Act employer was liable because of the employer's proximately causative negligence in failing to provide a safe means of ingress to the vessel, did the Court of Appeals on appeal from a judgment entered pursuant to mandate err in failing to reconsider its former opinion which had erroneously interpreted the District Judge's findings as containing "no finding of negligence" on the part of the employer?

3. When a District Judge sitting in admiralty without a jury has found an employer liable under the Jones Act (46 U.S.C., §688) for the deaths of two seamen-employees proximately caused by the employers failure to provide a safe means of ingress to the vessel and the proofs with reason justify his conclusion that employer negligence

played some part in producing the deaths, has the Court of Appeals in reversing the District Judge and reaching its own conclusion that the seamen's deaths "were the result solely of their own gross misconduct" failed to apply the clear error test required by *McAllister* v. *United States,* 348 U.S. 19, 20?

Statutes Involved.

Statutory provisions involved are the Limitation of Liability Act, 46 U.S.C., §181-189 and the Jones Act, 46 U.S.C., §688, which incorporates by reference the Federal Employers' Liability Act, 45 U.S.C., §51-60. Their pertinent text is set forth in Appendix A, *infra,* p. 1a.

Statement of the Case.

On April 22, 1957, H. Leslie Atlass brought a proceeding in admiralty in the United States District Court for the Northern District of Illinois under the Limitation of Liability Act, 46 U.S.C., §§181-189, for exoneration from or limitation of liability under the Jones Act, 46 U.S.C., §688, for the death by drowning on October 26, 1956, of two seamen employed by him.

After a trial before the Court sitting in admiralty without a jury on petitioners' Jones Act claims the District Judge entered findings of fact and conclusions of law (Appendix B, *infra* p. 4a) and a judgment (Appendix C, *infra* p. 15a) denying exoneration but limiting liability to the value of the vessel.

Petitioners' husbands drowned (each under different circumstances) when returning to their employer's pleasure yacht, which, on a voyage from Chicago to Florida, had run aground and was then cradled on a marine rail in Detroit, Michigan to facilitate an inspection for any damages. Although dining and toilet facilities

were ashore, the yacht's crew, including Muth and Darr, continued to be quartered on board the vessel. (Appendix B, *infra* p. 7a)

The District Judge found that access to the railbed from shore was hazardous particularly at night and that considering the debris and other obstacles on the walkway, dock, and railbed, and the hazards created by a thirty-two inch gap between the walkway and the railbed and differences of levels between the walkway and the railbed that the lighting of the walkway, dock, and railbed at the time of the drownings was insufficient. Appendix B, *infra,* p. 8a, 10a.

The District Judge concluded that under the Jones Act an employer is liable for deaths of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel and denied exoneration. Appendix B, *infra,* p. 12a.

The District Judge found that the employer "personally, who was in Chicago," at the time of the drownings, was without responsibility for the hazardous condition of the walkway, dock, and railbed as it existed at the time of the drownings and allowed limitation of liability. Appendix B, *infra,* p. 10a, 12a.

The District Judge found that Muth and Darr were in part responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drownings, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock, and railbed and of the gaps, differences in levels, and poor lighting. Appendix B, *infra,* p. 10a.

The District Judge prepared his own findings of fact. Prior to entering judgment, petitioners moved the District Judge to amend the findings to make more specific findings of negligence and proximate cause which were otherwise implicit in the findings and conclusions. This motion was denied. (Record 120, 122, 143)

The District Judge had stated orally:

> "I have concluded that Mr. Atlass the owner of the yacht was their employer on a borrowed servant basis and therefore he is liable under the Jones Act if there is any failure to provide a safe place to work or a safe means of ingress and egress to and from the vessel. I have concluded that there was not a safe place of ingress and egress to the vessel under the conditions as indicated by the evidence both with respect to lighting and the conditions on the dock itself, the scaffolding, the stanchions, the ropes, planks, and other debris as well as the lighting * * *. It is a combination cause of the conditions of the individuals and the conditions of the premises * * *." (C. of A. App. 6a)

On the first appeal, the Court below interpreted the District Judge's findings as containing "no finding of negligence on the part of any person except Muth and Darr" (350 F. 2d 598-599) or on the part of any of his employees or agents. (350 F. 2d 599) The Court below interpreted the findings as apparently *exonerating* Atlass "from *all* responsibility for the asserted negligent conditions existing at the time of the occurrence." (350 F. 2d 599) The Court below concluded that the two seamen were intoxicated to a greater extent than that found by the District Judge (350 F. 2d 596) and that such intoxication was "gross misconduct," (350 F. 2d 596) barring recovery under the Jones Act (350 F. 2d 597).

The Court below marshaled eight authorities in which the respective *trial* courts had exonerated the employer from any negligence on the facts before them, to wit: *Farrell* v. *United States, et al.*, 336 U.S. 511; *Wiper* v. *Erie Sand SS Company*, 293 F. 2d 491; *Schlicter* v. *Port Arthur Towing Company*, 288 F. 2d 801; *Barlow* v. *Pan Atlantic SS Company, et al.*, 101 F. 2d 697; *The SS Berwindglen*, 88 F. 2d 125; *Landy* v. *United States, et al.*, 101 F. Supp. 486; *Jackson* v. *Pittsburgh SS Company*, 131 F. 2d 688; and *Meintsma* v. *United States*, 164 F. 2d 976, 977 (350 F. 2d 596, 597, 601). It concluded that "the deaths of Muth and Darr were the result solely of their own gross misconduct" and that the District Judge erred in his refusal to exonerate Atlass of all liability. It reversed and remanded for further proceedings not inconsistent with the opinion. (350 F. 2d 601)

Petitioners filed separate petitions for certiorari. (Nos. 709 and 733 in the October, 1965 Term of this Court.) The petitions were denied. (382 U.S. 98) A joint petition for rehearing was denied. (383 U.S. 923) A motion for leave to file a second petition for rehearing was denied. (384 U.S. 914) Thereafter the mandate of the Court of Appeals issued.

In proceedings on remand the District Judge stated that he *had* found and concluded that there was negligence on the part of Atlass (C. of A., App. 20a-21a); that his finding that access to the railbed from shore was hazardous particularly at night was intended to be a finding of negligence (C. of A., App. 23a-24a); that he could not understand how the Court of Appeals could recognize with respect to negligence that the employer has a duty to provide seamen in his employ with safe and seaworthy appliances and a safe place to work and then find that

a finding which says that "access to the railbed was hazardous" is not a finding of negligence on the part of the shipowner (C. of A., App. 24a-25a); that his finding that access was hazardous and that it was not a safe place to work was intended to be the equivalent of a finding of negligence (C. of A., App. 26a); that if the Court of Appeals said that he did not find any negligence or any causation it was inconsistent with what he found (C. of A., App. 26a). The District Judge said that he found negligence in the Jones Act sense of failure to provide an adequate and safe place in which to work (C. of A., App. 28a); that such finding was contained in his finding No. 27 (C. of A., App. 28a); that in his opinion his findings were sufficient (C. of A., App. 29a); that in his opinion the test is that the employer has a duty to provide a safe place in which to work, that if he does not provide that there is negligence in law (C. of A., App. 31a); that the employer's duty to provide a safe place to work was not met (C. of A., App. 32a); that the negligence did not constitute affirmative acts, it constituted the employer's failure to provide a safe place to work (C. of A., App. 32a); that he did not see how one could come to any other conclusion than that it was implicit in the judgment denying exoneration that the hazardous conditions were a cause of the deaths. (C. of A., App. 38a)

The District Judge, recognizing his obligation to follow the mandate, (C. of A., App. 39a), entered a judgment granting the petition for exoneration and dismissing the Jones Act claims. (C. of A., App. 35a)

On appeal from such judgment petitioners contended in the court below, that the "law of the case" rule does not limit the power of the Court of Appeals to review

its holding on the exoneration issue presented by the former cross-appeal. *Messenger* v. *Anderson,* 225 U.S. 436, 444; and that the clarification of his findings by the District Judge in the proceedings on remand demonstrated that the decision of the Court of Appeals on the former cross-appeal was based upon a complete misconception of the District Judge's findings.

Respondents contended in the Court below, (1) that the Court's sole duty was to examine the decree entered by the District Judge to determine whether it conformed to the Court's mandate and if it did to dismiss the appeal with costs. *Stewart* v. *Salamon,* 97 U.S. 361, 362; *Aspen Mining & Smelting Company* v. *Billings,* 150 U.S. 31, 37; and (2) that the District Judge denied exoneration on a theory of unseaworthiness "without negligence."

Petitioners' Reply Brief argued again (1) that the "law of the case" rule was no longer an inexorable rule. *Luminous Unit Company* v. *Freeman-Sweet Company,* 3 F. 2d 577, 580 (7th Cir. 1924); *Mantle Lamp Company of America* v. *Knapp-Monarch Company,* 81 F. 2d 428, 430 (7th Cir. 1936); *Connett* v. *City of Jerseyville,* 110 F. 2d 1015, 1018 (7th Cir. 1940); *McGovern* v. *Eckhart,* 200 Wis. 64, 227 N.W. 300, 67 A.L.R. 1381; and (2) that the District Judge explained that though he found that Atlass and his employees did not affirmatively cause the hazardous conditions he did determine that the employer, Atlass, was negligent in failing to provide a safe, adequately lighted means of access. Petitioners argued that although the hazardous conditions were not caused by the employer or his agents, other than the shipyard, that there was negligence of omission in failing to correct the condition so as to provide a safe access for the seamen. Petitioners argued that denial of exoneration

did not require a double finding of negligence: it did not require the trial court to find that the employer caused the unsafe conditions which would be negligence of commission; it required that the negligence of the employer in allowing the unsafe conditions to continue was negligence of omission which caused in part the deaths of Muth and Darr.

The Court below composed of the same panel that decided the first appeal rendered a *per curiam* opinion affirming the judgment of the District Judge as rendered in accordance with its mandate on the first appeal.

The *per curiam* opinion does not inform the reader of the occasion for the second appeal. The briefs in the Court below are filed herewith as Exhibits.

Reasons for Granting the Writ.

As noted in the Brief of the *amicus curiae* filed herein, (383 U.S. 923) in connection with the former petition for certiorari, the findings of the District Judge contained "no expressed and well-articulated finding of fact that the employer or his agents had been negligent in their conduct" and "there was no expressed and well-articulated finding of fact that the negligence assuming such to have existed had played a part in causing the accident."

On remand when petitioners asked the District Judge to make additional findings in accordance with his oral explanation of his findings, he refused, saying:

> "That the Court of Appeals concluded whatever negligence there may have been or my failure to find negligence *per se* in such language even though I said it was hazardous, etc., was not a safe place to work, which so far as I am concerned is the equivalent, I am not going to play semantic games with the Court of Appeals * * *." (C. of A. App. 26a)

The widow and three children of Clem Muth and the widow and three children of Kurt Darr do not understand "semantic games." They have been deprived of their normal lives because of the failure of their husbands' and fathers' employer to provide his crew with a safe place of employment including an adequately lighted means of access to the vessel where employed. Because of the Court of Appeals' misinterpretation of the District Judge's findings they have further been deprived of substantial monetary damages and a review on the limitation issue. The Muth family damages were $129,554.98 before reduction for contributory negligence, and $58,527.49 after such reduction. The Darr family damages were $148,676.51 before reduction for contributory negligence, and $100,323.56 after such reduction. The erroneous allowance of limitation further reduced the combined damages to $50,000. (App. *infra,* 15a-16a)

The source of this deprivation is believed to be the failure of the District Judge and the Court below to apply principles established by this Court. The District Judge assumed that an individual employer, as opposed to a corporate employer, was entitled to limit his liability to the value of his pleasure yacht if he did not personally create the hazardous conditions at the shipyard where he quartered his crew while his yacht was undergoing minor repairs and was not personally present at the moment of the drownings.

This assumption is quite contrary to the well recognized view that *privity* or *knowledge* includes "some personal knowledge or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting an appropriate means to prevent it." *Lord* v. *Goodall SS Co.* (1877), 115 Fed. Cases, No. 8506, Affirmed

(1880) 102 U.S. 541, and therefore Atlass as sole owner-employer was never entitled to the benefit of limitation of liability.

The misunderstanding by the Court below of the principles of limitation of liability was even more pronounced. It assumed that the Limitation of Liability Act had something to do with contributory negligence. Thus, it said in the first opinion:

> "The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr." *In re Atlass' Petition,* 350 F. 2d 592 (7th Cir., 1965)

The Court below compounded the District Judge's misconception of the Limitation of Liability Act by reading the finding on the *limitation* issue that Atlass was not *personally* responsible for the hazardous conditions as one *exonerating* the employer "from *all* responsibility for the asserted negligent conditions existing at the time of the occurrence." *In re Atlass' Petition,* 350 F. 2d 592, 593 (7th Cir., 1965).

The court below failed to comprehend the fact that for purposes of the Jones Act the shipyard was Atlass' agent. (350 F. 2d 599) (C. of A., 29a); *Hopson* v. *The Texas Company,* 383 U.S. 262, 263-264. It determined that the conduct of Muth and Darr was "gross misconduct" barring recovery under the Jones Act contrary to *Bentley* v. *Albatross S. S. Co.,* 203 F. 2d 270, 272-274 (3rd Cir. 1953) and *McDonough* v. *Buckeye S. S. Co.,* 103 F. Supp. 473, aff'd 200 F. 2d 558 (6th Cir. 1952).

Petitioners sought to show in their previous petition for rehearing that because of the development of the St.

Lawrence Seaway the number of admiralty cases now being filed in the Seventh Circuit is increasing at a faster rate than the national level. They also sought to show that the Court of Appeals for the Seventh Circuit has not yet been affected by this increase in admiralty litigation. For this reason and others it was urged that it was extremely important that decisions such as this (which because of their scarcity in the Circuit will be regarded as landmark decisions) be correct.

The opinion of the court below on the first appeal ignored the principle announced in *McAllister* v. *United States,* 348 U.S. 19, 20). It completely confounds the Limitation of Liability Act. Yet, it is a landmark in and for the Seventh Circuit and undoubtedly will lead district courts required to follow the decision into repeated error. The second opinion of the court below contributes nothing to legal edification. In effect it puts the circuit back to a pre-*Messenger* v. *Anderson* (1912) era.

On the former petition for certiorari, petitioners' argument was characterized as "extravagant and unwarranted assertion and assumption." It was said:

> "The whole thrust of assertion and insinuation (and elision) in the petitions is that the trial court did not make findings of fact that it did make and that it made findings of fact that it did not make as just pointed out. Upon that false base they erect a *non sequitur* that the Court of Appeals held things that it did not hold."

In effect, petitioners' statements to this Court were discredited by respondents as misrepresentation. The proceedings on remand before the District Judge establish without doubt that petitioners' representations were true.

Unless this Court grants certiorari and corrects a grave injustice to two families, it appears that other seamen's families in the Seventh Circuit will be imposed upon in like manner.

Petitioners respectfully suggest that the circumstances of this case call for an exercise of this Court's discretionary review. For ten years, petitioners have been asserting Jones Act claims which require proof of proximately causative negligence. They have proceeded under no other theory always recognizing that in order to maintain their claims that it was incumbent upon them to prove negligence and proximate cause. The trier of fact determined that they did just that. The evidence, had it been reviewed in accordance with the rule in *McAllister* v. *United States,* would have sustained such determination. It is a travesty that petitioners should be denied recovery because of what has been characterized as "semantic games." The result here is believed to be more "recrudescense" of legal jargon intended to deprive employees of rights which Congress intended to give them by remedial, welfare legislation. See *Tiller* v. *Atlantic Coast Line R. Company,* 318 U.S. 54, 62-67; *Cox* v. *Roth,* 348 U.S. 207, 210.

The importance of the questions presented is further illustrated by the interest of the Admiralty Bar in this petition. See Appendix F, *infra,* p. 22a.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that their petition be granted.

Respectfully submitted,

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